

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP558-CR

Cir. Ct. No. 2007CF728

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN A. FISHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Nathan Fisher appeals a judgment convicting him of party to the crime of armed robbery with use of force. He also appeals an order denying his postconviction motion for resentencing. Fisher claims that trial counsel provided ineffective assistance in several respects at the sentencing

hearing. Irrespective of whether trial counsel performed deficiently, we conclude that Fisher was not prejudiced by any of counsel's alleged failures. We therefore affirm.

BACKGROUND

¶2 Fisher entered a no contest plea to the armed robbery charge in exchange for the dismissal of two bail jumping charges, plus additional concessions on other cases. The charge was based on allegations, and Fisher's own admissions, that Fisher served as the getaway driver for two other men who robbed a pharmacy at gunpoint, and that he was given \$100 and pills in payment. After the circuit court sentenced Fisher to eight years of initial confinement and nine years of extended supervision, Fisher filed a postconviction motion seeking resentencing based on ineffective assistance of counsel.

¶3 Because trial counsel died prior to the postconviction hearing, the defendant was not able to produce testimony as to the reasons for counsel's decisions. The circuit court denied some of the claims on lack of deficient performance and the remaining claims for lack of prejudice, and Fisher now appeals. We will set forth additional facts relevant to each claim in our discussion below.

STANDARD OF REVIEW

¶4 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless those findings are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's

conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *Id.*

DISCUSSION

¶5 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that counsel was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. *Id.* To prove prejudice, the defendant must additionally show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. *Id.* We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.*

¶6 Here, Fisher complains that trial counsel: (1) joined the State's recommendation for eight years of initial confinement, despite having previously discussed with Fisher making a recommendation of only five years of initial confinement; (2) failed to go over the PSI with Fisher; (3) failed to object to the prosecutor's misstatements about the number of Fisher's prior convictions and the number of Fisher's prior associates who were facing homicide charges; (4) failed to object to the prosecutor's use of arguably privileged statements Fisher made to a psychologist during court-ordered counseling sessions; and (5) failed to argue mitigating factors, such as his progress toward obtaining an HSED and the fact that Fisher had never before served a jail or prison sentence.

¶7 On the first claim, we will assume for the sake of argument that it was deficient performance for counsel not to ask for a sentence that was a few years less than that being requested by the State. The court explicitly stated at the sentencing hearing that “as between the five and ten years initial confinement on the guidelines here, the Court had settled pretty much on eight years,” subject to hearing the arguments. The court then noted that the evidence presented at the hearing confirmed the court’s view that eight years was appropriate, and rejected defense counsel’s recommendation for a shorter period of extended supervision. Under these circumstances, we cannot conclude that it was reasonably probable that the court would have sentenced Fisher to less than eight years of initial confinement even if defense counsel had requested it.

¶8 On the second claim, the circuit court did not credit Fisher’s assertion that counsel had failed to go over the PSI with him. We will not disturb such a credibility determination, and therefore have no factual basis to conclude that counsel’s performance was deficient in this regard. Furthermore, the court noted that the information that Fisher contends counsel should have emphasized from the PSI—namely, Fisher’s purported reason for refusing a jail transfer, and the fact that one of his prior offenses involved only a BB gun—were known to the court and were insignificant compared to Fisher’s other prior misconduct.

¶9 On the third claim, the court found the misstatement about Fisher’s criminal history to be non-prejudicial, given that it was immediately corrected and the proper number of convictions was set forth in the PSI. As far as Fisher’s prior associates, at the postconviction hearing Fisher admitted on cross-examination that he did actually know three people who had been charged with homicide. In any event, the court indicated that it did not even remember that argument, and was not influenced by it.

¶10 On the fourth claim, at the postconviction hearing Fisher acknowledged on cross-examination that his counseling sessions were court ordered as part of his juvenile supervision, and he could not recall whether he signed releases of those records as a standard rule of supervision. Contrary to Fisher's argument in his reply brief, it was his burden to show that the records were privileged, not the State's to show that they were not privileged. Because Fisher did not present sufficient evidence to show that his court-ordered counseling records were, in fact, privileged and that privilege had not been waived, there was no basis to conclude that counsel performed deficiently by failing to object to statements from those sessions.

¶11 On the fifth claim, the court again found no prejudice because it was already aware of each of the proposed mitigating factors, and did not deem any of them significant. We agree with that assessment. To the extent that counsel could have made different or additional arguments, we are not persuaded that the court would have imposed a different sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

